United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4083

To be argued by
THOMAS H. BELOTE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4083

CARLOS ANTONIO CASTRO-CABRERA,
Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR THE RESPONDENT

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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Carlos Antonio Castro-Cabrera ("Castro") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on April 16, 1975). That order dismissed the petitioner's appeal from an order of an Immigration Judge following a hearing, finding him deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) as a nonimmigrant who had remained longer than authorized. Specifically he had entered the United States on July 26, 1972 as a nonimmigrant crewman authorized to remain for the period of time the vessel remained in port, not to exceed twenty-nine (29) days, and had remained in the United States beyond that date without authority.

This petition for review was filed on May 6, 1975 and since that time the alien has enjoyed the automatic statutory stay of deportation which accompanies a petition filed

under Section 106(a) of the Act, 8 U.S.C. § 1105(a). The petitioner contends that the Board's decision should be set aside because the evidence introduced at the deportation proceeding was the result of an allegedly illegal arrest, search and seizure.

Issues Presented *

1. Was the petitioner's interrogation and arrest lawful?

2. Was the petitioner's order of deportation supported by clear, convincing and unequivocal evidence, untainted by an illegal arrest or seizure?

Statement of Facts

The petitioner is a thirty year old unmarried alien, a native and citizen of Ecuador. He was admitted to the United States on or about July 26, 1972 as a nonimmigrant crewman authorized to remain in this country for the period of time his vessel remained in port, not to exceed twenty-nine (29) days (R. 13).** He failed to depart as required, remained in the United States without authority, and accepted employment in violation of his nonimmigrant status.

On June 26, 1974 the petitioner was arrested by the police in Hempstead, New York and taken to the police station where he was questioned. The Hempstead police took the petitioner into custody on the basis of an anonymous letter dated June 20, 1974 (R. 8), the original of

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* We note that three additional petitions to review orders of the Board of Immigration Appeals, involving substantially identical issues, are presently pending before this Court:

Jose Gil Ojeda-Vinales v. *I.N.S.*, Docket No. 74-2634; *Luis Walters-Valdez* v. *I.N.S.*, Docket No. 75-4083; *Miguel Avila-Gallegos* v. *I.N.S.*, Docket No. 74-2647.

** References preceded by "R" are to the certified administrative record which has been filed with the Court.

which was sent to the Service and copies to the Chief of Police at Hempstead, New York and Westbury, New York. This letter reads as follows:

> "Dear Sir: I am writing about an individual who resides in Long Island, who is an illegal alien, uses two names, threatens to kill a number of persons, has homicidal tendencies, carries a knife, and is known to traffic in narcotics. This man is believed to be dangerous and should be deported. Description: CARLOS ANTONIO CASTRO CABRERA 10 Moore Avenue, Hempstead, New York. Employed under alias (PEDRO GOYA) at International Lamination, Cantiage Road, Westbury, N.Y. Drives Chevrolet, Plate # 290 LIE N.Y. Ecuadoran national approx-25 years of age. Please take appropriate action as you deem warranted." This letter was in possession of the Immigration Service several days before June 26, 1974."

During the course of interrogation the Hempstead police asked the petitioner what country he came from and he replied that he had come from Ecuador and had worked on a boat. He was also asked whether he had a green card, which he understood to be a card issued to lawful permanent residents, and he replied that he did not. The police telephoned the Service and an immigration officer appeared at the station. The immigration officer spoke to the petitioner in Spanish and placed him under arrest. The immigration officer then took the alien to the Mineola detention center where he was held overnight; the following morning the alien was taken to the Immigration Office by the immigration officer. While he was at the Immigration Office, petitioner's Form I-95, Crewman's Landing Permit, was taken from him. At no time did the alien produce any identification indicating the legality of his residence in the United States (R. 6, pp. 8-13, 16, 20-21, 23).

The Service instituted deportation proceedings against the petitioner on June 27, 1974 by the issuance of an order to show cause, notice of hearing, and a warrant of arrest (R. 14). At the deportation hearing on July 25 and July 29, 1974 the petitioner, through his attorney, admitted that his name was Carlos Antonio Castro-Cabrera, but did not admit the truth of the allegations in the order to show cause or concede deportability.

During the course of the deportation proceeding the following documents were submitted by the Service to establish Castro's deportability: (1) The aforementioned letter informing the Service that Carlos Castro-Cabrera was an illegal alien stating his place of employment and residence; (2) A copy of Form I-95-B secured from the Central Office records of the Service stating that Carlos Castro-Cabrera was admitted as a crewman aboard *M/V Bananacore* on April 24, 1972 for a period of not longer than twenty-nine (29) days; (3) a copy of a telegram to the Central Office of the Service from its District Director in New Jersey indicating that the same Carlos Castro-Cabrera had deserted his vessel thereby violating the terms of his entry as stated in the Form I-95-B; (4) Form G-166E indicating that an investigatory search for the same Carlos Castro-Cabrera had been actively continuing since his desertion from the aforementioned vessel; (5) Form 1-409, Report of a deserting crewman, dated August, 1972 confirming the time, place, and manner of desertion by the same Carlos Castro-Cabrera. These documents had been in the Service's records since the time of this petitioner's desertion and long before this alien was apprehended by the Service. They were never in the alien's possession and were presented at the deportation proceeding independently of the alien's arrest. The only document submitted in evidence which was in the alien's possession at the time of his arrest and which substantiated his deportability was Form I-95A, his crewman's landing permit. Despite the source of the

admitted evidence the alien contended that all the evidence establishing his deportability was obtained as a result of an unlawful arrest and an illegal search and seizure, and therefore all information in the Service's possession and presented at the deportation proceedings should be suppressed (R. 6, p. 2).

The Immigration Judge found the petitioner deportable as charged and denied his motion to suppress the evidence admitted during the deportation hearing. He found that there was no irregularity in the petitioner's arrest by the Immigration Officer, that in any event such irregularity would not affect the validity of the deportation proceedings, because there was sufficient independent evidence presented by the trial attorney which was in possession of the Service to establish petitioner's deportability. Accordingly, the Immigration Judge ordered petitioner's deportation to Ecuador (R. 4).

By Notice of Appeal dated August 9, 1974 the petitioner appealed the order of the Immigration Judge to the Board of Immigration Appeals (the "Board") (R. 3). On April 16, 1975 the Board dismissed the petitioner's appeal and affirmed the decision of the Immigration Judge (R. 2).

The Board rejected the petitioner's argument that the proceedings should be terminated because they were tainted by an allegedly illegal arrest. The Board found that the documentary evidence presented by the Service relating to the petitioner was untainted since it was independently adduced prior to the petitioner's arrest and that it established his deportability by clear, convincing, and unequivocal evidence.

Relevant Statutes

Section 106(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1105a(a) provides in part:

> The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. § 1031 et seq.) shall apply to, and shall be the sole and exclusive procedure for the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior act, except that—
>
> * * * * *
>
> (4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

Section 287 of the Immigration and Nationality Act 8 U.S.C. § 1352, provided in part:

> Sec. 287 (a) Any officer or employee of the service authorized under regulations prescribed by the Attorney General shall have power without warrant——
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the

United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.

ARGUMENT

POINT I

The arrest and interrogation of the petitioner was lawful.

The alien argues that his apprehension constituted an illegal arrest because it was undertaken without a warrant and on the basis of an unreliable informer. Further, he contends that an unlawful arrest requires a vacation of the order of deportation. The alien's position is untenable: first, because the arrest was legal and secondly, because its invalidity would not vitiate an otherwise valid deportation proceeding.

A. The statutory authority of immigration officers to interrogate and arrest aliens illegally residing in the United States.

Central to any discussion concerning petitioner's arrest are the powers conferred upon immigration officers by Section 287(a)(1) and (2) of the Act. Subsection (1) empowers immigration officers to interrogate, without a warrant, any alien or person believed to be an alien as to his right to be or remain in this country. This statutory authority, and temporary detention accompanying interrogation pursuant to Section 287(a)(1), have been repeatedly

upheld as a constitutionally permissible power to enforce the provisions of the Immigration and Nationality Act. *Cheung Tin Wong* v. *Immigration and Naturalization Service*, 468 F.2d 1123 (D.C. Cir. 1972); *Au Yi Lau and Tit Tit Wong* v. *Immigration and Naturalization Service*, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971); *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F.2d 683 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969). The Courts have often declared that officers in the normal course of their duties may approach and question persons as to possible violations, even though they then have insufficient grounds for arrest. Thus the arrests that follow can be lawful. *Terry* v. *Ohio*, 392 U.S. 1, 22 (1968); *Yam San Kwai* v. *Immigration and Naturalization Service, supra* at 686, 687; *Au Yi Lau* v. *Immigration and Naturalization Service, supra*, at 222.[1]

In addition to the interrogation powers referred to above, Section 287(a)(2) of the Act empowers an immigration officer, without a warrant,

> To arrest any alien in the United States if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be

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[1] Opposing counsel's brief erroneously relies on *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), to support his contention that the arrest in the instant case was illegal and therefore the deportation proceedings should be rendered *void ab initio*. *Almeida-Sanchez* considered the reasonableness of an automobile search pursuant to Section 287(a)(3), 8 U.S.C. 1357(a)(3). Furthermore, the sole contention on appeal was that the marihuana which was uncovered during the unconstitutional search should not have been admitted as evidence against him in the criminal proceedings. As noted *infra* the finding of deportability in this case did not rest upon any evidence arising from Walters' arrest. Furthermore, we submit that the arrest in the instant case was in total conformity with the constitutional protections recently discussed in *United States* v. *Brignoni-Ponce*, No. 74-114 (U.S. June 30, 1975).

> obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

That subsection thus requires the joinder of two elements to justify an arrest without a warrant: (1) reason to believe that the alien is in the United States illegally; (2) reason to believe that the arrested alien is likely to escape before an arrest warrant can be obtained. The "reason to believe" standard referred to in this statute has been analogized to the "probable cause" which traditionally underlies criminal arrests. See *LaFranca* v. *Immigration and Naturalization Service,* 413 F.2d 686, 689 (2d Cir. 1969).

B. Petitioner's interrogation and arrest complied with the statutory and constitutional requirements

It is submitted that the information received by the Service from the anonymous complainant and from the Hempstead police provided the arresting officer with sufficient reason to interrogate the petitioner. As a result of this interrogation a subsequent arrest was justified under Section 287(a)(2). In this respect the record reflects that the Service had in its files a Form I-409, Report of Deserting Crewman dated August 16, 1972 (R. 12); a Form G-166E, Report of Investigation of Antonio Carlos-Cabrera (R. 11); a telegraphic message with petitioner's name (R. 10); a Form I-95B, Central Office index copy of Seaman's Permit (R. 9); and the aforementioned anonymous letter, all relating to the petitioner. (These documents clearly showed that the alien was illegally residing in the United States, having deserted his vessel in August of 1972 and having continuously remained in the United States without

authority. At no time did this alien present evidence at the hearing to the contrary and thereby establish the legality of his residence in the United States.)

Thus the Service was aware of the petitioner's illegal presence in the United States and had made plans to check the address where the alien was residing (R. 6, p. 32, 37). Before it had an opportunity to do so the Hempstead police took him into custody and informed the Service that they had an illegal alien in their custody. It is clear that the immigration officer's purpose in going to the police station where the alien was detained was to determine whether Castro was in fact the illegal alien whom the Service sought.

The record reflects that upon arrival at the police station the immigration officer spoke to the alien in Spanish, and voluntarily received from Castro additional information confirming his illegal residence and corroborating the informant's tip as it related to his immigration violation (R. 6, p. 37). It was obvious that the petitioner had remained longer than authorized and was in the United States in violation of law. Furthermore, the immigration officer testified at the deportation hearing why an administrative warrant could not be issued prior to his actual questioning of Castro (R. 6, p. 37). Therefore the first element of a warrantless arrest pursuant to Section 287(a)(1) was satisfied.[2]

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[2] The Service officer did not rely on any interrogation by the Hempstead police but rather conducted his own independent interrogation pursuant to Section 287(a)(1). Thus even if there could be any complaint about the procedures followed by the local municipal police there is no doubt about the propriety of the Service's interrogation prior to arrest for the alien's immigration law violation. Further, even an arrest without probable cause by a local police officer would not vitiate a subsequent lawful deportation hearing. *Guzman-Flores* v. *Immigration and Naturalization Service*, 496 F.2d 1245 (7th Cir. 1974).

The second element of a warrantless arrest pursuant to Section 287(a)(2) was satisfied as well because the immigration officer had more than ample reason to believe that Castro, who might have to be released from police custody due to the fact that there were no pending charges against him, and who had no family ties in this country, would flee before an arrest warrant could be issued (R. 6, p. 37). Having identified himself as an immigration officer and inquired of the alien's right to be in this country, only a foolhardy officer would have left the premises to obtain a warrant with any rational expectation that the alien would await his return. In a metropolis as large as New York City this alien could have disappeared with confidence that he would not be apprehended by the Service. Effective enforcement of the immigration laws manifestly required that the officer place the petitioner in custody immediately, and thereafter bring him to the Service office as directed by 8 C.F.R. § 287.3.

C. *Miranda* warnings are not required when an immigration officer takes an alien into custody.

From time to time aliens have contended that the principles of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) are applicable to deportation proceedings and that evidence obtained without the warnings mandated by that case is inadmissible. These contentions have been rejected by the courts. Decisions in this area invariably reiterate the rule that deportation proceedings are civil and not criminal in nature. *Woodby* v. *Immgration and Naturalization Service*, 385 U.S. 276 (1966); *Harisiades* v. *Shaughnessy*, 342 U.S. 589 (1952). Deportation proceedings are not subject to the constitutional safeguards provided for criminal prosecutions. *Abel* v. *United States*, 362 U.S. 217 (1960). Numerous courts have specifically held that the exclusionary rule of *Miranda* is therefore inapplicable. *Chavez-Raya* v. *Immigration and Naturalization Service*, No. 74-1482 (7th Cir., July 16, 1975); *Jolley* v. *Immigration and Naturaliza-*

tion Service, 441 F.2d 1245, 1255 (5th Cir.), *cert. denied,* 404 U.S. 946 (1971); *Lavoie* v. *Immigration and Naturalization Service,* 418 F.2d 732, 734 (7th Cir. 1969), *cert. denied,* 400 U.S. 854 (1970); *Pang* v. *Immigration and Naturalization Service,* 368 F.2d 637, 639 (3rd Cir. 1966). See *Nason* v. *Immigration and Naturalization Service,* 370 F.2d 865, 868 (2d Cir. 1967).

The Court in *Chavez-Raya* noted that due to its fundamentally civil nature, a deportation hearing differs from a criminal trial in a number of significant respects: There is no presumption of innocence, and the alien has the burden of showing the time, place and manner of his entry into the United States; he may be required to answer non-incriminatory questions about his alien status and certain adverse inferences may be drawn from his silence; and his statements made during a preliminary investigation without the benefit of counsel may be admissible. In view of these facts, the Court held that *Miranda* warnings would be not only inappropriate but could also serve to mislead the alien.

POINT II

The deportation order is supported by clear, unequivocal, and convincing evidence untainted by any illegal arrest.

As stated *supra,* the evidence establishing the alien's deportability consisted of: (1) The informant's letter; (2) Form I-95B from the Service records created at the time of Castro's entry as a crewman and continuously in its possession; (3) the telegram to the Service's Central Office reporting Castro's desertion dated August, 1972; (4) Form G-166E, Report of Investigation, created and maintained by the Service substantially before Castro was located; (5) Form I-409, Report of Deserting Crewman, created and maintained by the Service shortly after Castro deserted his vessel; (6) Castro's testimony at the hearing; (7) the testi-

mony of the apprehending officer; (8) Form I-95A, Crewman's landing permit. Only the crewman's landing permit was in Castro's possession prior to the hearing. All other documents had been in the Service records long before Castro was apprehended. Therefore, even assuming arguendo, that the arrest was illegal, petitioner would not be entitled to the termination of his deportation. The petitioner's argument would have validity only if it were established that the evidence underlying the deportation order was itself obtained in violation of law. It is well settled that irregularities in the arrest alone do not vitiate the deportation order if that order was properly substantiated. This general rule has long been recognized by the Supreme Court, and has been repeatedly upheld by the courts in cases involving deportation proceedings. *Frisbie* v. *Collins*, 342 U.S. 519 (1952); *Bilokumsky* v. *Tod*, 263 U.S. 149 (1923); *Guzman-Flores* v. *Immigration and Naturalization Service*, 496 F.2d 1245 (7th Cir. 1974); *Shu Fuk Cheung* v. *Immigration and Naturalization Service*, 476 F.2d 1180 (8th Cir. 1973); *La Franca* v. *Immigration and Naturalization Service*, 413 F.2d 686 (2d Cir. 1969).

This rule holds whether the alien was illegally arrested by Immigration officers or by the municipal police. In *Guzman-Flores* v. *Immigration and Naturalization Service*, *supra*, the alien petitioners were stopped by the local police and taken into custody without probable cause for their arrest other than suspected alienage. They were detained overnight by the local authorities without any charges being lodged against them and were turned over to the Immigration Service the next morning. Their sole contention on appeal was that the deportation proceedings should have been terminated because they were arrested by local police without probable cause in violation of the Fifth and Fourteenth Amendments. This, they claimed, tainted the subsequent proceedings making the order of deportation illegal

as well. The court noted that there was sufficient untainted evidence of deportability and refused to accept this contention which would have extended the exclusionary rule.

If the rule were otherwise, aliens in the petitioner's position could permanently immunize themselves from deportation simply by showing that their initial apprehension was defective. No such absurd result is required or contemplated by the Act or the Constitution.

The petitioner was found deportable as an alien who had been admitted as a crewman for not more than twenty-nine (29) days and who remained in the United States longer than authorized. The order for his deportation was based on clear, convincing, and unequivocal evidence obtained from the Service's files and not on any tainted evidence seized at the time of his arrest. As this Court stated in *LaFranca* v. *Immigration and Naturalization Service, supra,* 413 F.2d at 689:

> "The Immigration and Naturalization Service did not rely upon any statement taken or evidence seized at the time of his arrest. Under these circumstances, even if the arrest without a warrant were illegal this would not invalidate the subsequent deportation proceedings."

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York

August, 1975

Respectfully submitted,

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